



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 587 OF 2012**

**GULF ENERGY LIMITED.....PLAINTIFF**

**VERSUS**

**NATIONAL MEDIA GROUP LIMITED.....1<sup>ST</sup> DEFENDANT**

**THE MANAGING DIRECTOR EDITOR, DAILY NATION.....2<sup>ND</sup> DEFENDANT**

**IMMACULATE KARAMBU.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

The plaintiff's case as pleaded in the plaint dated the 11<sup>th</sup> December, 2012 and filed in court on the even date is that on the front page and page 2 of the Daily Nation Newspaper issues dated Tuesday 16<sup>th</sup> October, 2012, the defendants and each of them printed and published or caused to be published articles concerning the Kenya Oil Industry which were reported by the 3<sup>rd</sup> defendant hereinafter referred to as "The Newspaper Article". On the previous evening, 15<sup>th</sup> October, 2012, the defendants and each of them published or caused to be published an abridged version of the Newspaper Article on the 1<sup>st</sup> defendant's website under the following links <http://www.nation.co.ke/News> (hereafter referred to as "The website Article"). The Newspaper Article and the website Article aforesaid are hereafter collectively referred to as "The said Article". The said Articles are reproduced herein- below verbatim with the sections thereof defamatory of the plaintiff underlined for emphasis:-

***"Petrol Prices Driven up By Suspect Deal"***

"A flawed tendering process which led to overpricing of freight charges could have led to Kenyans paying a higher price for their petrol.

"While the industry average for importation of crude oil has been \$0.90 per barrel, the winners of the September tender charged \$3.126 and \$2.83 per barrel.

"It was only after protests by industry players that the ministry hastily cancelled the tender awarded to Essar Energy and Gulf Energy Ltd. And just two days after the cancellation, Gulf Energy Ltd emerged the winner after retendering at \$1.475 per barrel, half its earlier price.

'You will note a huge difference between the bids received for subject tenders and the winning bids for previous tenders. In view of this, we recommend that you hold the award of these tenders and request that you call for a re-tender of the same. This will relieve consumers from paying exorbitant fuel prices if the subject cargoes will land in Kenya.... At the premiums received' read part of a letter from the Oil

Industry Supply Coordination Committee to the Energy Permanent Secretary Patrick Nyoike.

“In his defence, Mr. Nyoike blamed junior officers in his ministry for the mess, but imposed no sanctions on the officers or the companies involved.

“On Sunday, the Energy Regulatory Commission cited increases in freight costs as the key contributor to the sh5-6 per litre increase in pump prices.

“Notable is the fact that while the price of crude oil marginally rose by three per cent, the average cost of imported petrol rose by 12 per cent at the pump, an indication of how huge freight cost played to increase the overall cost.

“Industry players fault the ministry for allowing irregularities within the procurement system, and enabling bidders (oil marketers) to quote high freight costs for the import of crude oil.

“Freight costs form part of what ERC considers alongside international crude oil prices and taxes in calculating the recommended monthly prices.

‘The procurement is done by the Ministry of Energy. We work with what the Ministry has gotten as a tender result. Said ERC Director General Kaburu Mwirichia.

“The sudden change of price in September points to possible mischief within the tender system which could have informed increases in pump prices even in the past.

“The consumer Federation of Kenya’s (Cofek) now wants parliament to review the ERC Act to give the Commission a wider mandate in the procurement process.

“Cofek says this will seal off loopholes for oil marketers to inflate import costs at the expense of the consumers.

‘Parliament should review the ERC Act to give it a wide mandate outside just caps on oil prices. The commission is not relevant to consumers if it cannot address the broad repercussions of its decision on pump prices’ said Cofek Secretary General Stephen Mutoro.’

Cofek had earlier moved to court to oppose the decision by the Ministry of Energy to award the Kenya Petroleum Refineries Ltd monopoly under the new refinery regulations which elevated the facility to a merchant status from July this year.

“The consumer watchdog argued that it had ‘given oil marketing companies an opportunity to make profits at the expense of consumers.’

“KPLR has been slapped with a Sh. 119 million claim from Kenol Kobil for failing to issue a letter of credit for the company to facilitate the import of 80,000 tonnes of crude oil in august, resulting in losses to the oil marketer.

“With the claim on its way in addition to interest piling up on a 21.2 billion loan that KPLR acquired from Standard Chartered Bank in June this year, consumers are likely to be hard-pressed going forward should KPLR recover these costs from sale of finished fuel products.”

The plaintiff has averred that the Articles were widely distributed in the Jurisdiction and elsewhere and that at the material time, Daily Nation had millions of readers within and without this jurisdiction who had free, open and unhindered access to the libelous words complained of herein above.

That further and in the alternative, the defendants knew or ought to have known that once the said Articles were printed and published in the Daily nation and on the first defendant’s website aforesaid and distributed in the country and elsewhere, the same would be available for access and must in fact have

been accessed by extremely large numbers of readers in Kenya the region and indeed worldwide.

In paragraphs 9 and 10 of the plaint, the plaintiff has set out the meaning of the contents of the said article in their entirety either in their natural and ordinary meaning or by importation and innuendo.

It is averred that the defendants falsely and maliciously printed, published and distributed or caused to be printed, published and distributed the said Article well knowing that the allegations of and concerning the plaintiff were untrue.

It was further pleaded that before the broadcasting of the said libelous articles, the plaintiff in its capacity as a substantial and reputable oil marketer with interests both within and without this jurisdiction enjoyed extremely high esteem and respect from the public generally and from other oil marketers, business partners, bankers and clients, in the industry in particular.

That the said publication was malicious and calculated to injure, disparage and lower the esteem with which right thinking members of the society in general regarded and held the plaintiff. That as a consequence of the said publication, the plaintiff has been injured in his character, credit and reputation and it's standing in the public generally and in the industry in particular and has been brought to great ridicule, scandal, odium and contempt in the eyes of right thinking members of the society. As a result the plaintiff has suffered monumental loss of business.

That as a matter of fact, the website Article was made available to billions of readers worldwide who had completely unhindered access to the said article. Moreover, in the said Article the defendants invited members of the public to comment on the contents of the website Article by posting comments on the webpage. That the said invitation for comments in the said manner had the intended effect of encouraging further publication of the defamatory words and barely (12) hours after the website Article was published, at least fifty (50) highly defamatory comments had been printed by readers on the said website repeating the defamatory words and adding other defamatory ones. Some of the comments posted on the said website made allegations against the plaintiff either expressly or by innuendo.

The plaintiff further avers that the comments as posted by readers of the website Article had the effect of greatly lowering the esteem with which right thinking members of the society in general, regard and hold the plaintiff and to subject the plaintiff to public ridicule, anger, odium, scandal and outrage.

In its defence filed on 19<sup>th</sup> February, 2013, the defendants admitted having published the articles complained of but denied that they were falsely, unjustly, unlawfully and maliciously published of the plaintiff as alleged and that they were calculated to defame the plaintiff.

The defendants avers that in so far as the words complained of were concerned and their natural and ordinary meaning or otherwise, the same were published under a sense of public duty and without malice to the plaintiff and in the honest belief that the information contained therein was true and was further published as fair information on matters of public interest;

The role played by importers of crude and refined oil products as well as the marketers in the regulation of fuel prices in Kenya which prices have on a number of occasions paralyzed both the transport and industrial sectors of the country and as such generating concern from the public; And in the premises, the articles were published on a qualified privileged occasion.

The defendants deny that the words in their natural and ordinary meaning meant and/or were capable of the meaning attributed to it in paragraph 9(a) to (i) of the plaint both inclusive. They aver that they are entitled to enjoy the freedom of the constitution and in enjoying the said freedom, they responsibly published and printed the alleged defamatory Article.

They deny that the plaintiff has been seriously injured in his character, credit and/or reputation and has been brought into public scandal, odium and/or contempt either as alleged in the plaint or at all. They have denied that they invited members of the public to comment on the contents of the website Article as

alleged. The particulars of comments posted on the said website against the plaintiff are denied and that the said Article had the effect of lowering the plaintiff's esteem either as alleged or at all.

The defendants further deny that Article generated comments which demonstrated public anger and ridicule against the plaintiff either as alleged in the plaint or at all. They have denied the contents of the plaint that, they failed to meet the plaintiff's demands as pleaded in the plaint.

A reply to defence was filed on the 11<sup>th</sup> March, 2013 in which the plaintiff joins issue with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants on their joint statement of defence dated the 18<sup>th</sup> February, 2013. The plaintiff avers that the defence is a sham as it constitute of mere denials and that it does not answer to the plaintiff's claim.

Without prejudice, to the foregoing, the plaintiff has responded to the defendant's defence as follows; It has denied that the subject Articles were published in public interest so as to serve a public duty, or in circumstances of qualified privilege and it has reiterated that the subject Articles were published maliciously.

The plaintiff further avers that the freedom of the media cannot be cited as defence in the circumstances of this case. That the subject Article amounts to breach of the constitutionally guaranteed rights of the plaintiff and its owners and employees which include the right to dignity.

At the hearing the plaintiff called three witnesses in support of its case: Francis Koome Njugu (PW1) is the managing Director and Chief Executive Officer of the plaintiff. He told the court that the plaintiff is an oil marketing company and its business involves importing, whole selling, retailing and export of crude oil and petroleum products. Its business is in several countries through affiliate of gulf energy having its headquarters here in Kenya but has affiliate in Uganda, Rwanda, Tanzania but doing business all over including Southern Sudan and the Neighboring countries. He applied to have his statement adopted as part of his evidence.

He told the court of an Article that was published in the Daily Nation on the 16/10/2012 and on its online edition, which was titled "petrol prize driven up by suspect deal" . He identified the two Articles and both were produced as plaintiff's exhibits 1 and 2.

It was his evidence that the plaintiff sued the defendants because the Article was malicious as the plaintiff had no hand in what was alleged therein. He told the court that the article is not the correct representation of the facts on the ground as it is the ERC that has the sole mandate to review the pump prices of oil. He took the court through the process of importing oil in Kenya and the factors that determine the oil prices. According to him the problem the plaintiff has with the article is that its tender was for cargo to be delivered between the 19<sup>th</sup> – 21<sup>st</sup> November, 2012 while the date of the article is 16<sup>th</sup> October, 2012.

It was his evidence that the oil industry in Kenya is organized through an open tender system, the underlying system being to aggregate the countries demand into one large pool so as to benefit from economies of scale in purchasing petroleum products and secondly to ensure that there is efficiency at the point of delivery because a country has common user facility, one main import bathe to ensure that there is order.

That, deliveries are organized through an open tender system (OTS). That all oil companies sign a contract to guide the contractual relationship between the sellers and the buyers. It is the guiding document that guides the import and sale of oil products (crude oil and petroleum products between the oil marketing companies). He explained in great details, the process of awarding a tender to a company to import crude oil and petroleum products.

It was his evidence that the import of the article is that there was mischief in the award of the tender. That the plaintiff was the lowest bidder and it was awarded the tender therefore the article is not a proper representation of the facts. He told the court that the publication contains untruths that is alleging that the plaintiff's cargo which had not been delivered and was going to be delivered more than a month after the

date of the publication of the article had led to the rise of pump prizes that had been announced by the ERC two days before the publication of the article.

That immediately after the article was published, and as a corporate organization with good standing, the plaintiff and its customers were alarmed as they received calls and messages of concern even from its bankers and the plaintiff's officials had to explain that the contents of the article were not factual.

The court was told that the article elicited reactions by the readers of the Nation Newspapers as set out in the plaint. Before the article was published, nobody from the defendant group reached out to any of the plaintiff's officers for comments and/or input.

On cross-examination, he told the court that the plaintiff's name was mentioned in the first three paragraphs. He admitted that the first tender referred to as 11 was cancelled and a new one 11B was issued. In the first tender no 11 the plaintiff had tendered at +2.83 dollars per barrel but it was not the only company that had tendered. Another company namely Galana had also tendered but their bid was higher than that of the plaintiff. That the plaintiff won the 2<sup>nd</sup> tender and they quoted at Ksh1.47 per barrel.

Samuel Kang'ethe who testified as Pw2 told the court that he is a graduate of chemistry, bachelor of science, holds a diploma in management from the Kenya Institute of Management and masters degree in international business administration. It was his evidence that he has worked with several oil companies which include Esso limited, Total Kenya Limited, Engen Kenya Limited. He has worked in various capacities and has a wide range of experience spanning to a total of 16 years. He told the court that he is aware of open tender system referred to as (OTS) which is an agreement where the oil companies adhere to importation of petroleum products. The OTS is signed by all the oil companies and its sole aim is to regulate the importation of petroleum products into the country. It addressed among other issues, the issue of pricing, how to determine the winner and when the products were to be expected to the country. It was his evidence that the key factor in pricing of petroleum is the free on board pricing (costs) which is determined and published on the month the product was loaded. He was involved in the tendering process between the years 2003 to 2009 and by then the OTS agreement had been drafted and he was involved in its preparation. According to him, the tender system cannot be influenced and there is no possibility of it being flawed. He told the court that he is aware that the tender was cancelled because there was politics and a claim that the freight premiums were high. In his view, the cancellation of the tender had nothing to do with fraud but it had to do with the effect of market prices which led to the initial bids being higher but it was cancelled because of complains.

Kenneth Kariuki gave evidence as Pw3- He told the court that he read the article complained of and the impression he got was that gulf oil (the plaintiff) was wholly responsible for exploiting the public in raising oil prices, that there was dishonest in the way it did its business, it was responsible for the increase in fuel prices and it would stop at nothing to get an extra coin.

At the close of the hearing, the parties filed written submissions which they orally highlighted on the 2<sup>nd</sup> November, 2016 and which the court has duly considered.

In its submissions, the plaintiff submitted that for the court to determine whether the article was defamatory, the court is called upon to consider the essentials of the tort of defamation generally and to see whether these essentials have been established or proved.. it cited

(1) The case of ***Wycliffe A. Swanya Vs. Toyota East Africa Limited & Another (2009)eKLR*** where the court set out the essentials as following;

- (a) That the matter of which the plaintiff complains is defamatory in character.
- (b) That the defamatory statement or utterance was published by the defendant.
- (c) That it was published maliciously.

Mabeya J. in the case of *CFC Stanbic Bank Limited Vs. Consumer Federation of Kenya (COFEK) being sued through it's officials namely Stephen Muturu & 2 Others (2014)eKLR* echoed the holding of *Wycliffe A. Swanya case*.

On whether the words referred to the plaintiff, the court was referred to Halsbury's Laws of England, 4<sup>th</sup> edition Vol. 28 where it noted;

"Where the plaintiff is referred to by name or otherwise clearly indentified, the words are actionable even it they were intended to refer to some other person. It is not essential that the plaintiff should be named in the statement. Where the words do not expressly refer to the plaintiff they may be held to refer to him if ordinary sensible readers with knowledge of the special facts could and did understand them to refer to him.

The plaintiff also cited the case of *Newstead Vs London Express Newspapers Limited (1939) 4. All ER 319* where Lord Denning K.C. was of the view that;

***"The fact that the writer did not intend to refer to the person who suffers is by itself no excuse. Nor is the fact that the words are true of another person by itself any excuse "***

Still on the same issue, Mackinnon L.J. in *Newstead Vs. London Express Newspaper Limited (supra)* also held the view that;

"First, if A publisher to another person or persons word which upon their reasonable meaning refer to B, then, if those words are defamatory as holding B up to hatred, ridicule, or contempt and if the words so referring to B cannot be justified as true, A may be liable for damage to B. Secondly, the reasonable meaning of the words, upon the question whether they refer to B, must be tested objectively and not subjectively. The question is what do the words mean as words not what did A in his own mind mean by them or intend to mean. Thirdly, A cannot plead as a defence that he was unaware of B's existence. Fourthly, A cannot plead a defence that the words are in their reasonable meaning, equally, capable of referring to C, and that, when referring to C, they are true.

The court while dealing with the same subject in the case of *Mwangi Kiunjuri Vs. Wangethi Mwangi & 2 Others (20116)eKLR* held the view that'

***"Where identification is in issue, it is the duty of the trial court to rule whether or not the words are reasonably capable of being understood to refer to the plaintiff. In determining this question, the trial court must consider whether or not ordinary reasonable persons having the knowledge proved, could understand the words to refer to the plaintiff"***

With regards to an unnamed claimant *Lord Denning Mr. in Hayward Vs. Thomson & Others (1981) 3 All E.R 450* held'

"One thing is of essence in law of libel. It is that the words should be defamatory and untrue and should be published ***"of and concerning the plaintiff"***. That is, the plaintiff should be aimed at or intended by the defendant. If the defendant intended to refer to the plaintiff he cannot escape liability simply by not giving his name. He may use asterisks or blanks. He may use initials or words with a hidden meaning. He may use any other device. But still, if he intended to refer to the plaintiff, he is liable. He is to be given credit for hitting the person whom he intended to hit. The law goes further; Even if he did not aim at the plaintiff or intended to refer to him, nevertheless, if he names the plaintiff in such a way that other persons will read it as intended to refer to the plaintiff, then the defendant is liable.

In view of the cases quoted above, the plaintiff submitted that the extracts in the article refer to the plaintiff and they were understood to mean that the plaintiff was a bidder in the September tendering process, the September tendering process was flawed with irregularities, and that the plaintiff's change of prices points to possible mischief within the tender system which could have informed increase in pump

prices in the past.

That the court was told that even in the paragraphs of the article in which the plaintiff was not expressly mentioned, the defendant cannot escape liability as it is clear that they intended to and did in fact refer to the plaintiff. That the defendants did not contest that the article refers to the plaintiff herein and no evidence was called to demonstrate that the article did not refer to the plaintiff.

On whether the words were defamatory; it was submitted that the harm to the plaintiff was demonstrated by PW3 who testified that the high esteem he had held the plaintiff with was diminished upon reading the article. Further PW1 testified that upon publication of the article, he received numerous phone calls from some clients and other companies and individuals seeking to confirm the authenticity of the article. Therefore, the plaintiff's reputation was subjected to contempt, disgrace and ridicule. In this regard, the court was referred to the case of *East African Standard Vs. Gitau (1970) E.A. 678* where it was held.

“It is the general impression that the words are likely to create in the minds of a reasonable person which must be considered rather than making a close and precise analysis of the words used”.

The plaintiff averred that the general impression that the words in the article are likely to create in the minds of a reasonable person are inter alia that, it is responsible for the current high prices of fuel and other essential commodities, is selfish, self-seeking, greedy, fraudulent and corrupt company pre-occupied with the sole aim of enriching itself, is a beneficiary of dishonest practices, is a ruthless and scrupulous dealer which would not stop at an opportunity to make quick shilling by short-changing its business associates and customers at large and is part of a greedy and despicable cartel within the oil industry and the ministry which is responsible for the current upsurge of oil prices. That such words like “suspect deal”, “flawed tendering process” imposed no sanctions on the officers or companies involved “sudden change of prices” are out –rightly defamatory given that they are false and have no basis whatsoever.

It was submitted that in considering whether a statement is defamatory or not, the surrounding circumstances should be taken into account. See the case of *Muriuki Vs. Waruru & Another (2005) eKLR*.

The court was told that the article was published at a time when the prices of petroleum and petroleum products were on an upward trend and the general public was getting tense as a result. The article must have led the public to belief that there was a cartel in the oil industry which the plaintiff was a key player in and it was this cartel that was responsible for manipulation of market thus leading to unjustified sky rocking of fuel prices. That the alleged manipulation of fuel prices by the plaintiff implied in the said article lowered the reputation of the plaintiff as can be implied from the comments by the general public which showed that the article generated feelings of hatred, contempt, abhorrence and disdain towards the plaintiff. Examples of such comments as sampled are “those thieves” “don't they enjoy making genuine money” “they finish us” “few unscrupulous individuals” among others.

On whether the publication of the article was malicious; the court was referred to the case of *Phineas Nyagah Vs. Gitobu Imanyara (2013)eKLR* where the court held;

“Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts..... malice may also be inferred from the relations between the parties before or after the publication or in the conduct of the defendant in the course of the proceedings. Court should however be slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsity. See the case of *Horrocks Vs. Lowe (1974) 1All E.R 662*.

It was submitted that the defendants were malicious as they published the article recklessly without verifying whether the information was true or not. That the OTS and the energy (petroleum) pricing

Regulations are documents which are in the public domain and had the defendants consulted these defendants the tender process would have been laid bare before the author. It was further submitted that the media council of Kenya code of conduct for practice of journalism in Kenya requires media practitioners to publish fair, accurate and unbiased stories on matters of public interest. It requires that all sides of a story should be reported and comments should be sought from anyone who is mentioned in an unfavourable context. The defendants herein did not seek comments from the plaintiff before publishing the article.

Though the defendants did not call any evidence, submissions were filed on their behalf.

In the said submissions, the defendants admitted having published the article complained of but avers that the same was printed as a matter of expressing of opinion and were matters of fair comments and fair information upon facts which are matters of public interest, that is a qualified privilege namely; the role played by importers of crude and refined oil products as well as oil marketers in the regulation of fuel prices in Kenya, which prices have on a number of occasions paralysed both the transport and industrial sectors of the country as such generating concern from the public.

It was also submitted that the article does not mention the plaintiff expressly and the same is not defamatory as it contains allegations of fact and its true in substance so far as it expresses opinions, they are fair comments made in good faith and with no malice against the plaintiff.

That the article did not injure the reputation of the plaintiff and that no evidence was led to prove malice on the part of the defendant. That the defence of qualified privilege is available to the defendants as the article was published honestly and without malice in that during the hearing, it came out clearly that there was an original tender which was cancelled as a result of an irregularity causing a re-tender for the provision of services.

Whether the defence of qualified privilege is available to the defendants, the plaintiff submitted on the essentials of the said defence and cited the case of *Joseph Njogu Kamunge Vs. Charles Muriuki Gacharia (2016) eKLR* where the court held;

“The person making a statement has a duty to do so and that the person who hears or reads the statement has corresponding interest in doing so.

Similarly in the case of *KL Vs. Standard Limited (2014)eKLR* Odunga J. had this to say on the defence of qualified privilege;

***“Qualified privilege, though it also protects the maker of an untrue defamatory statement, it does so only if the maker of the statement acted honestly and without malice. If the plaintiff can prove “express malice” the privilege is displaced and he may recover damages; but it is for him to prove malice once the privilege has been made out, not for the defendant to disprove it”.***

The plaintiff avers that it has demonstrated malice on the part of the defendants and therefore the defence of qualified privilege is not available to the defendants. Further, the defendants did not adduce evidence in support of that alleged defence. In support of his contention, the plaintiff relied on several cases to wit that of *Stephen Gachau Githaiga & Another Vs. A.G. (2015) eKLR* where the court commented on the consequences of a party failing to adduce evidence as follows;

***“Although the defendant has denied liability in an amended defence and counter-claim, no witness was called to give evidence on his behalf. That means that not only the defence rendered by the 1<sup>st</sup> plaintiff stand unchallenged but also that the claims made by the defendant in his defence and counter-claim are unsubstantiated. In the circumstances the counter-claim fails”.***

The case of *Trust Bank Ltd Vs. Paramount Universal Bank Ltd & 2 others HCCC No. 1243/2001* was also cited.

The defendants also cited the case of **Samuel Ndung'u Mukunya Vs. Nation Media Group Ltd & Another (2015) eKLR** where Aburili J. held;

***“ it is a fundamental principle of ethics and advocacy in Kenya and elsewhere that counsel must have a proper basis for stating from the bar a fact in any pleadings; and practice of the courts is based upon an expectation that the said principle is respected. In my view, the principle applied to an averment that a defamatory statement is true, is a fair comment, is of public interest, applies with no less force than it applies to other averments such as qualified privilege. The occasion of qualified privilege is a question of law. However, the court could not decide that question without facts that were never brought before the court by the defendant and/or proved”.***

In submitting that the article was not published under a sense of public duty in exercise of freedom of the media, the plaintiff cited the case of Joseph Njogu Kamunge Vs. Charles Muriuki Macharia (supra) which quoted the case of Reynolds Vs. Times Newspapers (1999) H.L. which sets out the guidelines for a defendant who wishes to rely on the said defence and submitted that the defendants having failed to demonstrate that any of the guideline above were followed then the article was not published in public interest. That article 33(3) of the constitution, requires that in the exercise of the freedom of expression, every person shall respect the rights and reputation of others.

The court has carefully considered the pleadings filed in this matter, the evidence on record and the detailed submissions by the learned counsels. In my view, the issues for determination are;

- (1) Whether the article was defamatory of the plaintiff.
- (2) Whether the article was false and malicious
- (3) Whether the article was published by the defendants
- (4) Whether the article and the words refer to the plaintiff.
- (5) Whether the plaintiff is entitled to damages and how much.
- (6) Who should meet the costs of the suit

I now proceed to consider the issues as set out herein above.

It is clear that the plaintiff's cause of action is based on defamation. Defamation as a tort does not fit one definition, it depends on the circumstances of each case. In the 7<sup>th</sup> edition of Salmond on the law of Torts, defamation is defined as follows;

***“The wrong of defamation consists in the publication of a false and defamatory statement concerning another person without lawful justification”.***

In **Ondonkara vs Astles (1970) EA 374**, a defamatory statement was described as follows;

***“... A statemet is defamatory of a person of whom it is published if it is calculated to lower him in the estimation of ordinary just and reasonable men”***

The tort of defamation was well described in 1970 in British Columbia Court of Appeal decision of **Murphy Vs. Ha March (13DLR sd 484)** where a member of parliament Judy La March wrote about the plaintiff as follows;

***“ A brash young radio presenter, named Ed Murphy heartily detested by most of the press gallery and the members had somehow learnt that Maurice Lamontagne (the Secretary of state and a long-time friend and adviser of the prime minister had purchased furniture but had not paid for it.”***

In finding that there was actionable libel, the British Columbia Supreme court in dismissing the appeal wrote;

***“Defamation is where a shameful action is attributed to a man (he stole a purse) , a shameful character (he is dishonest) , a shameful course of action (he lives on the avails of prostitution) or a shameful condition (he has small pox). Such words are considered defamatory because they tend to bring the man named into hatred, contempt or ridicule. The more modern definition of defamation is words tending to lower the plaintiff in the estimation of the right thinking members of the society generally”.***

Another authority often cited as definitive on defamation is that of *Thomas Vs. CBC* (1981) 4WWR 289 as follows;

***“ The gist of the torts of libel and slander is the publication of matter (usually words) conveying a defamatory imputation. A defamatory imputation is one to a man’s discredit or which tends to lower him in the estimation of others or to expose him to hatred, contempt or ridicule or to injure his reputation in his office, trade or profession or to injure his financial credit. The standard of opinion is that of right thinking persons generally. To be defamatory an imputation need not have actual effect on a person’s reputation. The law looks only to its tendency. A true imputation may still be defamatory although its truth may be a defence to an action brought on it; conveying untruth alone does not render an imputation defamatory”.***

The common law of defamation protects every person from harm to their reputation by false and derogatory remarks about their person known as defamation.

The elements of the tort of defamation are well set out in the case of *J. Kudwoli Vs. Eureka Educational and Teaching Consultants & 2 others HCCC No. 126/1990* which are;

- (1) The matter of which the plaintiff complains was published by the defendant.
- (2) The publication concerned or referred to the plaintiff.
- (4) That it was defamatory in character;
- (4) That it was published maliciously and;
- (5) That in slander, subject to certain exceptions, that the plaintiff has suffered special damage.

The same principles were repeated in the case of *Wycliffe A. Swanya Vs. Toyota East Africa Limited and Francis Massai Nairobi CA No. 70/2008*

Applying the above principles to the case herein, it is not in dispute that the article was published by the defendants.

Was the article defamatory?

In the Black’s Law dictionary, 8<sup>th</sup> edition, the word defamation is defined as follows;

***“Tending to harm the person’s reputation by subjecting that person to public contempt, disgrace or ridicule or by adversely affecting the person’s business.***

The defendants contend that the words were not defamatory as the article was true. On the other hand, the plaintiff avers that it was defamatory. It was submitted that the harm to the plaintiff was demonstrated by the evidence of PW1, who as the Managing Director and the Chief Executive Officer of the plaintiff. He told the court that after the article was published the plaintiff received calls and messages of concern from their customers and even its bank seeking to know whether the article was factual. It is also on

record that there were several reactions from the readers of Nation Newspapers who commented after they read the article. Some of the comments printed on the website are captured hereunder;

***“Ought to be cursed is part of the cartels that will “finish” the public “if they are not checked “Is part of a few “unscrupulous individuals enjoying monstrous impunity especially in pre-election months” “is part of a rotten system (which is) fleecing Kenyans” Is Part of a group christened “Lords of impunity” and which is responsible for causing Kenyans “suffering”.***

All the comments reproduced above were negative in nature and they portrayed the plaintiff in negative light. Needless to say, the comments followed the negative opinions that the readers made after reading the article as they were all reacting to it.

The evidence of PW3 is also relevant in this regard. He told the court that after he read the article he got the impression that the plaintiff was wholly responsible for exploiting the public in raising fuel prices and that there was dishonesty in the way it did business. He also formed the opinion that the plaintiff was responsible for increase in fuel prices and it would stop at nothing to get an extra shilling. After the article he has only fueled at the plaintiff's twice since 2012 and that as a lay man he read some mischief and collusion going on.

He told the court that the general impression that one would get on reading the article is that the plaintiff has contributed to the current high prices of fuel and other essential commodities, is a beneficiary of dishonest and dishonorable practices, would participate in fleecing the members of the public with a view to making a quick profit.

There is no doubt that the words used in the article are defamatory given the circumstances in which they were published and also considering that the article was published at a time when the prices of petroleum and petroleum products were on an upward trend and the general public was getting tense. As Justice Kimaru observed in the case of *Muriuki Vs. Waruru (supra)*;

“Whether a statement is defamatory or not depends not ----upon the intention of the defendant but upon the probabilities of the case and upon the natural tendency of the publication, having regard to the surrounding circumstances whether the article was false and malicious.

In their defence, the defendants denied having any malice in publishing the article and averred that the same was published as a matter of expression of opinion and that they were matters of fair comments on a matter of public interest, that is a qualified privilege.

For the plaintiff to succeed in a claim of defamation, he has to prove malice. On the other hand malice can be inferred and for malice to be inferred, the language of the published article ought to have altered the facts and their meaning and there ought to be animosity. From the record, no evidence was led by the plaintiff to prove that there was animosity between it and the defendants. However, it is trite that malice can be inferred from the circumstances. See the case of *Phineas Nyagah Vs. Gitobu Imanyara (2013) eKLR (supra)*.

The failure to inquire in the facts is a fact from which inference of malice may be properly drawn. The defendants herein have been accused of publishing the article without inquiring into the correct facts thereof. PW1 in his evidence told the court that the defendants did not bother to consult him or any other officer of the plaintiff to verify the truthfulness of the article before it was published. PW2 gave a graphic account on the tender process and the factors that influence the fuel prices in Kenya. It was his evidence that it is very unlikely that a tendering process can be manipulated and there is no possibility of it being flawed.

He further told the court that the open tender system (OTS) addresses among other issues, the pricing, how the winner is determined and when the products would be expected in the country. The oil marketers would only quote for one item which is the freight and premium, all other factors contributing to the pricing and costs of the products are out of control from the sellers side. Those factors include free on

board costs, exchange rates, demurrage incurred and inland transportation within Kenya and any losses incurred which would include oceanic losses, pipeline losses and depot losses.

It is also on record that at the pump, the energy regulating commission is guided by energy regulations 2010 to determine what is to be charged at the pump. The energy regulations 2010 has detailed formulation of how both the wholesale and retail prices are calculated across the country. That the OTS and the regulations are public documents and can be accessed by anyone through the website. The opening of bids is done in public by a representative from the ministry of energy and all the participants would be represented together with pipeline coordinators and the refineries.

It was his evidence that the article was not a factual representation of the facts as stated because a tender opening in September, the costs of the product will come to the market 2 months thereafter and according to the regulation this will not be included in the costing until 2 1/2 months later.

From that evidence by PW2, the following facts emerge,

- (1) That the article was not a factual representation.
- (2) The tender system was strict and was not capable of manipulation by any oil marketer (bidder)
- (3) A tender opening in September or for any particular month, the cost of that product will come to the market 2 months after.
- (4) The OTS and the energy regulations are public documents that are freely accessible to the members of the public.

It is clear from evidence on record that the defendants did not bother to verify the truthfulness of the article before they published it. There is no evidence from the defendants that they perused the said documents before publishing the article. Had they done so, then they would have known the truth and they would have been better informed which they failed to do.

The evidence of PW1 is also clear that the defendants did not contact the plaintiff or even himself to get their side of the story or to ascertain the correct facts. This is against the media council of Kenya code of conduct for practice of journalism in Kenya (code of conduct) which requires that both sides of the story should be reported and comments should be sought from anyone who is mentioned in an unfavorable context, I therefore find that the article was malicious and false.

Though the defendants have raised the defence of qualified privilege , they did not call any witnesses in support of the said defence.

As Judge Aburili held in the case of Samuel Ndung'u Mukunya (supra). The occasion of qualified privilege is question of law. However, the court could not decide that question without facts that were never brought before the court by the defendant and/or proved. This court having found that there was malice in publishing the article, in absence of any evidence by the defendants to the contrary, the defence of qualified privilege is displaced.

As to whether the article refers to the plaintiff, the impugned article was published in the leader. I have personally looked at the article as I am obliged to do. The heading on page 1 reads;

“Petrol price driven up by suspect deal”. In that part of the article the plaintiff's name is mentioned as one of the oil companies that had been awarded the tender together with Essar. The article goes on to say that two days after the cancellation, Gulf Energy Limited emerged the winner after retendering at 1.475 per barrel, half its earlier price.

All the witnesses who testified in this case knew that the article referred to the plaintiff as one of the companies that was involved in the tender. No evidence was tendered by the defendants to support their

position that the tender prices were flawed and/or explain the reasons why the first tender was cancelled yet they went ahead and published the article claiming that the tender prices were flawed.

In the Halisbury's law of England, the learned author states that;

***“Where the words do not expressly refer to the plaintiff they may be held to refer to him if ordinary sensible readers with knowledge of special facts could and did understand them to refer to him, such facts are material facts, must be pleaded in the statement of claim and must be proved in evidence in order to connect the plaintiff with the words complained of. Such a pleading is often called a reference of innuendo in contrast to a true innuendo where the extrinsic facts only bear on the defamatory meaning”.***

Moreover, in the case of ***Mwangi Kiunjuri Vs. Wangethi Mwangi & 2 others (2016) eKLR*** the Court of Appeal was of the view that;

“Where identification is in issue, it is the duty of the trial court to rule whether or not the words are reasonably capable of being understood to refer to the plaintiff. In determining this question, the trial court must consider whether or not ordinary reasonable persons having the knowledge proved, could understand the words to refer to the plaintiff. If no reasonable person could have reasonably understood the words as referring to the plaintiff, there is no question left for determining but if the words could reasonably lead persons acquainted with the plaintiff to believe that he was the person referred, to then the trial court has to make a determination whether or not the words did in fact refer to him.

I have meticulously studied the plaint, in my view, all that ought to have been pleaded for proof in a case of defamation was pleaded by the plaintiff herein. The particulars of innuendo are stated in paragraph 9 of the plaint. All the plaintiff's witnesses testified that they had no doubt in their minds that the impugned article referred to the plaintiff. I have seen no reason to doubt their evidence and sincerity on the matter. They sounded truthful and convincing. In all these circumstances the court is satisfied on a balance of probability that the impugned publication referred to the plaintiff. I so find.

On whether the plaintiff is entitled to damages; having found that the publication in the instant suit was defamatory, I will now address the issue of the assessment of the damages. I am aware that the quantum of damages is a matter which falls within the discretion of the court, taking into account, obviously, the facts and circumstances of the plaintiff in the society.

The court should however, consider it unnecessary to make damages rise to such levels as to confine access to justice to the wealthy. Victims of wrongs should indeed be adequately compensated but so far as it is practicable, there should be predictability and consistency in awards the courts make.

There are numerous cases in this country where issues of damages have been considered. However, most of them included natural persons. Cases involving artificial persons as in the instant case, appears to be rare.

I have considered the submissions by the defendant on the quantum of damages. The plaintiff did not address itself to the issue of quantum and has left it open to the court to make an award that it deems reasonable.

It should be remembered that a man defamed does not get compensation for his reputation, that is simply because he was publically defamed. Compensation by damages operate in two ways:- as vindication of the plaintiff to the publication and as a consolation to him for a wrong done. Compensation is here a consolation rather than a monetary re-compensate for harm measureable in money. ***See the case of Vein Vs. John Rairax & sons property Limited 177 C.L.R. 115, page 150.*** The same position was held in the case of Brigadier Arthur Ndong Owuor Vs. the Standard Limited, Nairobi HCCC NO. 511/2011 where the court held;

***“Once a reputation is lost in my view, monetary damages might not be adequate compensation. Monetary damages might be a consolation yes, but they will never be an adequate compensation for the lost reputation. In the eyes of the public, once a person’s reputation has been damaged, it will remain in memory possibly thought his life”.***

The defendants have suggested a sum of Kshs.2,000,000/- as general damages. They have cited the cases of Nation Newspapers Limited Vs. Gibendi (2002) as quoted by Odunga J. in ***Ndung’u njoroge & Kwach Advocates & another Vs. Standard Limited & 2 others (2012)eKLR*** where no award was made as the case was dismissed. They have also relied on the case of ***Kwacha group of companies & another Vs. Tom Mshindi & 2 others (2011) eKLR*** where a sum of Kshs.3.000,000/- was awarded and lastly the case of ***Esso Standard Limited Vs. Semu Amanu SCCCA 33=43 of 1987*** quoted by Odunga J. in the case of ***Ndung’u Njoroge and Kwach Advocates & Another Vs. Standard Ltd & 2 others (2012)eKLR***. Where a sum of Kshs.5,000,000/- was awarded.

Taking into account the above awards and the case of Hashi Energy Limited Vs. Nation Media Group HCCC No. 272/2008 recently decided by Mbogholi J., which is persuasive to this court, where an award of Kshs.15,000,000/- was made, it is my considered view that a sum of Kshs.15,000,000/- is reasonable as general damages.

The plaintiff has also claimed exemplary and aggravated damages. In this regard, I wish to rely on the case of ***John Vs. MGN Limited (1996) 2All E.R 35*** where the court of appeal held;

“The successful plaintiff in a defamatory action is entitled to recover the general compensatory damages such sum as will compensate his for the wrong that he has suffered. That must compensate him for damages to his reputation, vindicate his name, and taken account of the distress, hurt and humiliation which the defamatory publication caused.

Exemplary damages on the other hand goes beyond compensation and are meant to “punish” the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive and where it is attracted by malice; insistence on a flimsy defence of justification or failure to apologize.

Taking into account all the peculiar facts surrounding this case, especially the fact that the defendant has to-date defiantly refused to apologize to the plaintiff, I consider an additional sum of Kshs.5,000,000/- to be an adequate award of exemplary damages. A further sum of Kshs.3,000,000/- is awarded as aggravated damages.

I decline to grant prayer (a) of the plaint as it is worded in very general terms and its vague.

The cost of the suit are awarded to the plaintiff.

Dated, signed and delivered at Nairobi this 9<sup>th</sup> day of March, 2017.

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**L NJUGUNA**

**JUDGE**

***In the presence of***

***For the Plaintiff***

***For the 1<sup>st</sup> Defendant***

***For the 2<sup>nd</sup> Defendant***

*For the 3<sup>rd</sup> Defendant*